



**Testimony of Joan Claybrook, President, Public Citizen,  
before the  
Subcommittee on Regulatory Affairs of the  
House Committee on Government Reform  
*Submitted June 28, 2005***

Thank you, Ms. Chairman and members of the Subcommittee on Regulatory Affairs, for the opportunity to offer this testimony on the Office of Management and Budget's (OMB's) nominations to the U.S. Departments of Transportation and Labor that came out of its 2004 Report to Congress.

My name is Joan Claybrook and I am the President of Public Citizen, a national non-profit public interest organization with over 160,000 members nationwide. We represent consumer interests through lobbying, litigation, regulatory oversight, research and public education. I am also a former regulator, as the Administrator of the National Highway Traffic Safety Administration (NHTSA) in the Department of Transportation from 1977 to 1981. I have worked to improve motor vehicle safety for more than 40 years.

Today I would like to make three major points.

**1. Well-designed health, safety and environmental protections stimulate the economy, result in better products and improve the overall quality of life.**

We are here today because regulated industry, like most of us, would prefer not to be told what to do. The question is whether this dislike for rules is justified because it causes economic harm to industry or to all of us. While it may seem intuitive that regulations cost businesses and jobs, there is little actual research to suggest that this claim is true. There is in fact strong scholarship and empirical evidence to the contrary.

The industry mainly cites badly inflated and repackaged data from a flawed study by Crain and Hopkins, in which the data dates from 1990 and 1991.<sup>1</sup> The OMB cites a study by the World Bank and an economist from the Organization for Economic Cooperation and Development (OECD) that dealt with the constraints on capital under regulated economies – including constraints on property and contractual rights.<sup>2</sup> Yet the U.S. is already the least restrictively regulated industrial country in the world.<sup>3</sup> The OMB-cited studies do not address the economic consequences that might arise from

rollbacks of our existing, relatively robust and well-justified health, safety and environmental rules.

In fact, most of the evidence on environmental and safety protections points in the opposite direction. Just as pollution wastes resources, unchecked harm to society is a squandered opportunity to prevent injury or save lives. We all pay, in terms of higher insurance and medical costs, in lost worker productivity and illness, and even in traffic delays. As just one example, the annual cost of all traffic crashes in the U.S., which take more than 42,000 lives and inflict more than 3 million injuries every year, is more than \$230 billion in 2000 dollars, or \$800 for every man, woman and child in the U.S.

It is not mere conjecture that well-crafted and well-justified regulation spurs innovation and growth – it is fact. Regulation also enhances competitiveness and helps to ensure that industries are shielded from the often dire consequences of short-term, profit-driven decision making. For example, the fuel economy standards put in place while I was Administrator helped to shield the domestic auto industry from a disaster during the late 1970s domestic oil crisis, created jobs in more sustainable technologies, insulated fuel costs from inflation-inducing spikes and reduced harmful pollution.

The literature on manufacturing competitiveness and regulation, and core insights from my 40 years of participation in the regulatory process, shows that well-designed rules can improve economic well-being in the following ways:<sup>4</sup>

- **It is far cheaper to prevent harm than to clean up afterwards.** Regulation that corrects market failures and requires the internalization of costs that would otherwise be inflicted on society turns a failure into a win-win. The innovation that it stimulates often results in cleaner, higher quality products with more consumer appeal and export value, and creates new industries and jobs (*i.e.*, in recycling, manufacturing pollution abatement technologies, antilock brakes, or air bags). Rules that internalize the real costs of activities connect cause with effect, focus attention on mitigation at the source, and generate useful information about inefficiencies. While in theory this brings the price of goods closer to the actual resource costs, in practice it often does even better by stimulating greater efficiencies – both improving quality and reducing harm.
- **Stimulating investment in sustainable practices is a core government function that also benefits industry.** According to the “Porter hypothesis,” a theory authored by Michael Porter of Harvard’s Kennedy School of Government which posits that well-crafted regulations lead to economic growth, the stimulation effect is far greater when regulations are more rather than less stringent. This is because growth from such “innovation offsets” can encourage true progress: extraordinarily creative measures which leap-frog industrial practices to new levels of quality, utility, environmental responsibility and societal well-being. To the extent that OMB’s meddling introduces unjustified uncertainty into the regulatory process, its actions can incur additional delay and unwarranted costs in the form of investment insecurity, undermining these benefits.

- **Regulation levels the playing field and reduces total societal costs for beneficial innovations.** Rolling back regulations, or not implementing appropriate regulations, unfairly imposes costs on the public. In contrast, rules that set minimum motor vehicle safety standards, for example, assure that the safety investment will be made by every manufacturer, and that suppliers will compete to bring down costs over time. These cost reductions can happen quickly and be quite dramatic. In the case of air bags, according to testimony by Fred Webber of the Alliance of Automobile Manufacturers at a hearing last week in the House Energy and Commerce Committee, the cost of frontal air bags fell from \$500 in the early 1990s to “well below \$100” today. The public and industry both benefit from far greater economies of scale when optional equipment becomes standard. For example, while side impact air bags can cost as much \$500 today, government estimates for side impact air bags as standard equipment in the near future are in the \$120 per vehicle range, including automaker and dealer profit.
- **As OMB concludes, health, safety and environmental rules are beneficial on balance.** While much of industry’s complaints focus on costs alone, every accounting report by OMB has found that regulations on the whole produce benefits that exceed costs by over threefold.<sup>5</sup> This is remarkable, as OMB’s accounting of benefits ignore many unmonetized and qualitative benefits.

The assault on regulation is a convenient lobbying strategy: it is far easier to blame the rules than deal with the truth. A wealth of research shows that direct labor costs, such as the wages for comparably skilled workers, are the major driver for industrial decisions to relocate jobs, not regulatory costs, which are less than one percent of the cost of shipped goods.<sup>6</sup> A closer look at recent history tells us there is little merit to industry’s claims that manufacturing rules are the cause of recent job losses in the manufacturing sector.

While these losses are both devastating and pervasive, very few new major regulatory burdens have been added to the manufacturing sector since 2000. In short, job losses have skyrocketed while the level of regulatory compliance has remained essentially unchanged since the mid-1990s, which was a time of record economic gains. It thus makes no sense to blame regulatory burdens for changes more likely attributable to fundamental shifts in the U.S. and global economy since 2000.

It appears far more likely from the literature and recent events that free trade agreements and tax loopholes encouraging foreign investment are the cause for industry job flight, as corporations seek out countries offering the lowest wages for workers. For example, a major study by the Economic Policy Institute shows that between 1993 and 2002, the North American Free Trade Agreement (NAFTA) resulted in a net loss of 879,280 American jobs.<sup>7</sup>

## **2. OMB’s 2005 Draft Report lacks objectivity and balance.**

What is the sound of one hand clapping? OMB has more than earned the skepticism and antipathy of the public interest community by repeatedly publishing drafts

and final reports that make no mention of the serious objections submitted in comments to it. It is frustrating for regulatory experts who raise principled, well-documented critique, to receive no response, or even acknowledgment, from OMB regarding their potent analysis.<sup>8</sup>

This is in sharp contrast to the regulatory agencies, which must respond to comments under the Administrative Procedures Act in regulatory preambles. It is a miscarriage of OMB's assignment to conduct a notice and comment process on the draft versions of its report, yet never to actually respond to the arguments and facts presented. The outcome is a sloppy report, developed in a self-imposed vacuum, that provides little meaningful insight into crucial questions about regulatory needs.

The uncorrected flaws and omissions pointed out in comments but largely ignored by OMB are evidence of OMB's anti-regulatory bias and include the following:

- **Some rules in, others out.** OMB's decision to limit analysis of costs and benefits to a 10-year window is arbitrary. A regulation does not arbitrarily stop producing costs and benefits when it falls out of the temporal scope of OMB's analysis. For example, a range in benefits from \$433 million to \$4.4 billion with costs of \$297 million flowing from an EPA rule on acid rain (NOx) reductions, was excluded from the 2005 draft as untimely. OMB's 2005 draft also cherry-picked the specific rules included for analysis, presenting monetized costs and benefits for only 11 of its embarrassingly small ten-year total of 26 major rules.<sup>9</sup> The report's accounting omits all homeland security rules, as well as what OMB nonsensically designates as "transfer rules."<sup>10</sup> Adding to the incoherence, OMB admits to serious difficulty in aggregating cost and benefit estimates from different agencies, which apply different assumptions over different time periods.<sup>11</sup>
- **Some studies in, others ignored.** OMB again neglected recent publications and studies detailing serious flaws in its current cost-benefit analysis practices, including several seminal look-back studies previously submitted to OMB by Public Citizen.<sup>12</sup>
- **Structural and informational flaws in cost-benefit analysis disregarded.** While cost estimates are inflated by industry sources, benefits information is underfunded, lacking or incomplete. Static cost projections prior to a rule's implementation usually become inaccurate over time as costs decline significantly, and innovations reduce compliance costs. Agencies also fail to factor in off-setting economic gains resulting from regulation-spurred innovation and growth in sustainable industries.
- **Costs and benefits of deregulatory actions utterly omitted.** OMB's single-edged sword fails to count lost benefits suffered by the public when safeguards are weakened or blocked, such as the Environmental Protection Agency's crippling of the New Source Review program under the Clean Air Act. The neglect of these costs to the public in OMB's report misrepresents the true costs of the failure to regulate effectively.
- **Ethical problems invalidate attempts to monetize the value of human life.** OMB's random assignment of a \$6.1 million value to a human life is grounded in dubious and totally discredited research on willingness-to-pay for risk reductions by

outdated studies of workers in high-risk jobs.<sup>13</sup> This habit, and the discounting of life that accompanies it, are both morally offensive and intellectually bankrupt.

- **Information gaps and uncertainties are compounded by macro-level attempts to compute overall costs and benefits.** Without answering the criticism already addressed to OMB's overly simplistic accounting methods, the 2005 draft report solicits comments on a "net benefits" approach which would conceal lost opportunities to significantly increase benefits for a minimal increase in costs and would even further diminish the already questionable value of OMB's conclusions.

Finally, OMB's role directly conflicts, in many cases, with authorizing mandates agencies receive from Congress. For many workplace health, safety and environmental protections, as the Supreme Court has recognized, cost-benefit analysis in standard-setting is forbidden or is not an authorized basis for a standard.<sup>14</sup>

OMB's drive to impose cost-benefit analysis may stem from a confusion about the difference between decisions about *means* and decisions about *ends*. Cost-benefit analysis may be helpful in order to develop the most cost-effective *means* for carrying out a policy. In contrast, it is unethical to set the ends or goals for safeguards based upon any other factor than their impact on human health and well-being.

### **3. OMB's "hit list" is an inappropriate interference in agency functions.**

There are two fundamental hypocrisies in OMB's interference in agency activities in the form of the "hit list," a process initiated by Office of Information and Regulatory Affairs (OIRA) Administrator John Graham that would irrationally discard those rules most disliked by industry:

- 1) The nomination and selection process for OMB's hit list lacks the minimum indicia of accountability and transparency that it would reasonably expect of any agency process; and
- 2) Its unwarranted and unauthorized interference in agency and Congressional priorities is unsupported by any analysis of the costs and benefits of the regulatory rollback it recommends or of the harm caused by delay in agency issuance of important new rules.

The consequence of these two flaws is that OMB's list is intellectually incoherent. OMB's choices for the hit list remain unexplained and unjustified. When OMB summarized the original 189 submissions in December 2004, it stated that it would instruct agencies to review the suggestions and respond. OMB then summarily announced the 76 hit list endorsements, without revealing any of the rationales for the presence of these on or off the list or the responses of the relevant agencies. OMB merely repeated the reasons offered by nominators in the first instance. The public deserves to be informed of the reasons for prioritizing these suggested rollbacks of their safeguards.

OMB also must justify the need for this process in view of the many other ways in which special interests can and do affect regulatory policy, which include petitions for rulemaking, comments to regulatory dockets, lobbying Congress, litigation and the direct lobbying of agencies. Instead, the hit list process lacks any disclosure where it counts most – OMB’s substantive decision making about priorities.

While OMB may attempt to cast this process as a method for unearthing long-neglected and commonsense regulatory “fixes,” at least two of the matters highlighted in testimony today, the hours-of-service rule and the hexavalent chromium rule, are the subject of ongoing agency rulemakings that have been pending for more than a few years. OMB does not explain why the rulemaking processes of agencies, as well as, in the case of hexavalent chromium, a review process initiated by the Small Business Administration, are insufficient to address the industry’s concerns.

Moreover, OMB must provide a good reason for its provision of yet another special access porthole in view of the tremendous and uneven power that regulated interests already have to weaken and derail regulation. The public, with only a relatively diffuse interest in the outcome of particular rules, is systematically disadvantaged by high-level attempts to hijack public priorities. OMB’s dabbling only exacerbates this profound inequality.

Leaving agenda-setting to Congress and the agencies makes much more sense. Congress is available to identify emerging public policy issues and to direct agencies to act, while the agencies know their issues with a depth and breadth that a handful of economists and a scientist or two at OMB cannot match. The courts also play a constitutionally assigned oversight role in safeguarding Congressional intent and assuring that evidence presented in the regulatory docket drives agency action.

While regulations may end up being far from perfect, the point is that the process involves a carefully designed balance, embedded in the separation of powers, and that OMB’s interference has no place in this purposeful architecture. OMB’s sole appropriate function is to assist in the coordination of delegated authorities among the agencies. It should not be a political gatekeeper or provide an appeal of last resort to derail rules for corporate interests.

Public Citizen’s 2004 comments called OMB to task for focusing on creation of a hit list rather than on unmet health safety and environmental needs. To that end, we submitted recommendations for affirmative action on 32 pressing social problems. OMB’s misappropriation of two of our nominations for its hit list does not alleviate the process deficiencies outlined above. While both of our rulemaking actions now on its hit list are legitimate areas for action by NHTSA, OMB fails to explain its rejection of our 30 other nominations, all of which were equally deserving of attention by NHTSA or another agency. This committee should direct OMB to explain its reasons for rejecting or accepting candidates for its hit list and to publicly share agency responses.

We were somewhat surprised to note that OMB appears to agree with our assessment that a motor vehicle compatibility standard is needed, and that voluntary manufacturer activity to address vehicle mismatch in crashes is insufficient. Vehicle compatibility is a long-neglected area. The design of light trucks — and large SUVs and pickup trucks in particular — with a high center of gravity, high bumpers, and steel bars and frame-on-rail construction, makes these vehicles highly aggressive in crashes.

A car driver is twice as likely to die if their vehicle is struck on the driver's side by an SUV rather than by another car. A vehicle compatibility standard is needed to mitigate harm done by aggressive vehicle designs. In addition, a consumer information program for an incompatibility rating would allow consumers to make more ethical decisions about the likely harm inflicted on others when purchasing a vehicle. Rather than pushing for these needed items, OMB appears content with NHTSA's promise to publish a report on this issue. This certainly ranks among the most tepid responses by any agency to a hit list prompt, and is far from good enough.

A requirement for an occupant ejection safety standard is pending in the Senate version of H.R. 3, the highway reauthorization bill and has received widespread bipartisan support. More than 13,000 highway fatalities involve ejection each year. Government estimates are that advanced glazing in side windows would save between 500 and 1,300 people each year, while stronger door locks and latches would prevent hundreds of deaths annually. Especially troubling is the fact that safety belts are not designed to protect occupants in rollovers, and more than 400 belted occupants are killed annually in rollover ejections.

We strongly support Congressional enactment of a requirement for a new ejection prevention safety standard, particularly when combined, as it is in H.R. 3, with a new standard for roof crush. A strong roof crush rule could dramatically reduce ejections by closing the ejection portals caused by roof deformation and broken side window glass.

Two of the other hit list nominations to be discussed today fall more squarely into OMB's typical anti-regulatory approach. In the case of both the hours-of-service and hexavalent chromium rules, court involvement initiated by Public Citizen was required to assure that the federal agencies act according to their statutory mandate. Also in both cases, Public Citizen's litigation was founded on a science-based challenge, and our claims were upheld by the reviewing court, U.S. Courts of Appeal in rulings by a three-judge panel.

I will address the hours of service rulemaking first. In 2003, Public Citizen sued the Federal Motor Carrier Safety Administration (FMCSA) over a final rule extending allowable driver time from 10 to 11 hours and for other serious flaws that diminished safety. The overall impact of the various parts of the overturned rule was to increase total work time by nearly 40 percent and total driving time by 20 percent.

A U.S. Court of Appeals for the District of Columbia Circuit overturned the rule, harshly criticizing FMCSA for failing to consider the effect of the rule on the health of

truck drivers as well as other challenged aspects of the rule. The Court strongly suggested that the agency's rule was not founded in science, which shows an increase in risk every hour of driving beyond eight hours on the road. The agency is now in rulemaking to respond to the court's decision.

Truck drivers are currently exempt from the Fair Labor Standards Act, and receive no overtime pay despite having to work 14-hour shifts – nearly double the daily hours of the average American. Truck driving is very strenuous work, involving operating a heavy vehicle for long periods of time, as well as unloading and loading shipments. Motor vehicle crashes involving commercial trucks kill nearly 5,000 Americans each year,<sup>15</sup> and many of these crashes are fatigue-related.<sup>16</sup>

OMB's endorsement of a nomination to extend maximum driving time from 10 to 11 hours is entirely without basis in science and would greatly jeopardize the safety of both the public and commercial drivers. As FMCSA acknowledges in its rulemaking, performance degrades geometrically after eight hours, and in fact, the risk of a crash *doubles* between the 10<sup>th</sup> and 11<sup>th</sup> hours of consecutive driving.<sup>17</sup>

The local or short-haul drivers that are the focus of OMB's hit list item are not exempt from the cumulative fatigue of these long work shifts. Although fatigue effects for these workers may be relatively less severe when compared to long-haul drivers, long on-duty hours, regardless of driving time, still degrade performance and increase risk. One major study by FMCSA of short-haul drivers found that fatigue was a factor in 20 percent of the 77 critical incidents over a two week period where the driver was deemed at fault.<sup>18</sup> Studies show that the overall impact of long work shifts negatively impacts safety, with risk approximately doubling after 12 hours of work.<sup>19</sup> Long work days are exhausting, in and of themselves, and allowing drivers to continue driving at the tail-end of these long shifts merely would exacerbate risks to others on the road.

OMB's inclusion of OSHA's hexavalent chromium rulemaking on its list is similarly unjustified. All reputable scientists agree that hexavalent chromium is a lung carcinogen. The National Institute for Occupational Safety and Health in 1975, the National Toxicology Program in 1980, the Environmental Protection Agency in 1984, the International Agency for Research on Cancer in 1990 and the Agency for Toxic Substances and Disease Registry in 2000 have all reached this conclusion. So has OSHA itself. In 1994, in response to a petition from Public Citizen and a union now allied with the United Steelworkers to reduce occupational hexavalent chromium exposure levels, Joseph Dear, then Assistant Secretary of Labor for Occupational Safety and Health, stated that there is "clear evidence that exposure ... at the current [Permissible Exposure Limit] PEL ... can result in an excess risk of lung cancer."

Because of OSHA's failure to act on this conclusion, we sued the agency in 1997 and again in 2002. We prevailed in the second case, resulting in a court order from the U.S. Court of Appeals for the Third Circuit that OSHA produce a final rule by January 18, 2006. The court decried OSHA's "indefinite delay and recalcitrance in the face of an admittedly grave risk to public health" and held that "OSHA's delay in promulgating a



lower permissible exposure limit for hexavalent chromium has exceeded the bounds of reasonableness.”

On October 4, 2004, OSHA produced its court-ordered proposed rule, reducing the PEL from the current 52 micrograms to 1 microgram per cubic meter. In general, this rule is thoughtfully assembled, and comprehensively analyzes all data available to the agency. OSHA acknowledges that its new PEL leaves “clearly significant” health risks; we believe that it is economically and technologically feasible to lower the PEL still further to reduce these risks.<sup>20</sup> Based on the leading epidemiological study in the field (the Gibb study), exposure to hexavalent chromium at the current PEL of 52 micrograms per cubic meter for a working lifetime (the required assessment under the Occupational Safety and Health Act) would result in 351 excess lung cancer deaths per 1,000 workers. Even at the proposed PEL, nine excess lung cancer deaths per 1,000 workers would occur, well in excess of the standard set in the Supreme Court’s 1980 *Benzene* decision. At present, the agency estimates that over 85,000 workers (22.4 percent of chromium-exposed workers) exceed the proposed PEL.

The industry has already made full use of its numerous opportunities to influence this rulemaking. Through individual chromium-using companies, industry associations and the so-called Chrome Coalition, the industry intervened in both lawsuits, provided written comments during the three stages of the rulemaking, testified and cross-examined witnesses at a ten-day OSHA public hearing, participated in the Small Business Regulatory Enforcement Fairness Act (SBREFA) process, and held at least two meetings with the OMB. The chromium industry testimony in this hearing is simply the latest round in an effort, stretching back over a decade, to undermine a proposed rule that could save hundreds of lives.<sup>21</sup>

It is not as if OSHA has been too busy to regulate hexavalent chromium. The agency has not completed a single regulation on an occupational chemical since 1997 and, except for this court-ordered proposal, has not proposed any such regulation since at least the beginning of the Clinton administration. There is little else of substance on the agency’s regulatory agenda at present.

### **Conclusion: OMB misses the point.**

Regulations are a modern form of the social contract. They embody a fundamentally democratic idea about the exchange of responsibilities among participants in a society. The expression of values and moral judgments enacted by government safeguards are completely neglected in OMB’s econometric accounting of what government is or does.

To illustrate the depth of commitment and salience of the common sentiments captured in government standards, I'd like to suggest the following five principles for understanding the purposes of government regulation. These are my own version of the ideals at stake in debates over the nature of the regulatory process and decisions about whether and how to regulate:

- 1) Corporations, like people, should clean up after themselves and be required to prevent the foreseeable harm of actions and choices.
- 2) Government action should correct social and political wrongs, set out fair rules for participation, distribute resources fairly and preserve and protect shared resources and the public commons.
- 3) Government activity both reflects and enacts moral values and collective goals – clarifying who we are and what matters to us.
- 4) People have a responsibility to actively respect the lives and health of people we do not know, as well as the natural environment and its limitations and gifts.
- 5) Voluntary risks are morally distinct from risks imposed upon the public without their knowledge or consent.

The principles encapsulate some of what is systematically disregarded by OMB's cynical view of both government and the people whom government protects under the constitutional prescription that it "promote the general Welfare."

Because much government activity is motivated by equitable concerns for others, rather than narrow self-interest, OMB's basic framework excludes a real understanding of its subject. Members of Congress, on the other hand, must be responsive to the human concerns that animate government action. They therefore should recognize the crippling limitations of OMB's analytical tools and worldview.

## Endnotes

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<sup>1</sup> In a hearing in 2003, Graham thoroughly dismissed the Crain and Hopkins study regularly cited by industry, stating:

“The fact that attempts to estimate the aggregate costs of regulations have been made in the past, such as the Crain and Hopkins estimate of \$843 billion mentioned in Finding 5, is not an indication that such estimates are appropriate or accurate enough for regulatory accounting. Although the Crain and Hopkins estimate is the best available for its purpose, it is a rough indicator of regulatory activity, best viewed as an overall measure of the magnitude of the overall impact of regulatory activity on the macro economy. The estimate, which was produced in 2001 under contract for the Office of Advocacy of the Small Business Administration, is based on a previous estimate by Hopkins done in 1995, which itself was based on summary estimates done in 1991 and earlier, as far back as the 1970s. The underlying studies were mainly done by academics using a variety of techniques, some peer reviewed and some not. Most importantly, they were based on data collected ten, twenty, and even thirty years ago. Much has changed in those years and those estimates may no longer be sufficiently accurate or appropriate for an official accounting statement. Moreover, the cost estimates used in these aggregate estimates combine diverse types of regulations, including financial, communications, and environmental, some of which impose real costs and others that cause mainly transfers of income from one group to another. Information by agency and by program is spotty and benefit information is nonexistent. These estimates might not pass OMB’s information quality guidelines.”

**Hearing on H.R. 2432, Paperwork and Regulatory Improvements Act of 2003**, July 22, 2003, Transcript at 21 (statement of John Graham). Nonetheless, the 2005 Draft Report refers to this study without further qualification. See Office of Info. & Reg. Affs., OMB, 2005 Draft Ann. Rept. on Costs and Benefits of Fed. Regs. (hereinafter “Draft Report”) (calling the Crain and Hopkins study a “recently sponsored . . . study” proving a disproportionate burden on small businesses).

<sup>2</sup> The Center for Progressive Reform (CPR) highlighted in comments last year to the 2004 draft report that OMB relied upon flawed and inapposite studies to support its claim of a regulation-economic strength trade-off. See Heinzerling, Lisa and Frank Ackerman, Letter to Lorraine Hunt, OIRA, May 20, 2004, at 4. OMB repeats this mistake in this year’s draft report, citing the same flawed and inapposite studies, such as the Heritage Foundation index. OMB states that “[s]ince 1995, the Heritage Foundation and the *Wall Street Journal* have published jointly a yearly index of economic freedom for 161 countries. They find a very strong relationship between the index and per capita GDP.” OMB Draft report, at 30. OMB uses the Heritage Foundation index in support of the “impact of smart regulation on economic growth,” even while acknowledging that a “correlation between degrees of economic freedom and per capita GDP does not prove that economic freedom causes economic growth.” *Id.* OMB also cites an index published by the Fraser Institute, which CPR also criticized in comments to the 2004 draft report. OMB uses both the Heritage Institute and the Fraser Institute indexes, even though, according to OMB, both “have several drawbacks,” such as “the data are based largely on subjective assessments and survey results” and “include non-regulatory indicators.” Additionally, OMB cites a World Bank study despite an extensive critique of OMB’s use of the report last year by CPR that showed the report’s conclusion to be inapplicable to OMB’s purposes.

<sup>3</sup> OMB, “Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations,” at 33.

<sup>4</sup> The leading article in this line of study is the justly famous Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. Econ. Perspectives 97 (1995). Other important studies include the following: Ebru Alpay, Steven Buccola & Joe Kervilet, *Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing*, 84 Amer. J. Agr. Econ. 887 (2002) (finding that Mexican food manufacturers developed improved efficiencies in operations as a result of increasing stringency of environmental regulation); Eli Berman & Linda T.M. Bui, *Environmental Regulation and Productivity: Evidence from Oil Refineries*, 83 Rev. Econ. & Stats. 498 (2001) (finding that L.A. Air Basin oil refineries achieved improved operations directly because of heightened environmental standards); Eban Goodstein, *Polluted Data*, Amer. Prospect, Nov.-Dec. 1997, at 64 (charting many cases in which regulations resulted in innovations that significantly offset the initial cost of compliance); Stephen Meyer, *Environmentalism and Economic Prosperity: An Update* (MIT, Feb. 1993) (finding that states with stronger environmental protections tended to have higher GDP growth than states

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with laxer regulation); Office of Tech. Assessment, U.S. Cong., Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach (Rep. No. OTA-ENV-635, Sept. 1995), *available at* [http://www.wws.princeton.edu/~ota/disk1/1995/9531\\_n.html](http://www.wws.princeton.edu/~ota/disk1/1995/9531_n.html).

<sup>5</sup> OMB, Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations, at 4.

<sup>6</sup> See generally Kevin Gallagher, Trade Liberalization and Industrial Pollution in Mexico: Lessons for the FTAA (Global Dev. & Envt. Inst. Working Paper, Oct. 2000) (finding that labor costs rather than pollution abatement regulation drive overseas relocation of industries); Eban Goodstein, A New Look at Environmental Protection and Competitiveness (Econ. Pol. Inst. Briefing Paper, 1997) (concluding that industries that spent more on regulatory compliance between 1979-1989 exhibited superior performance to foreign competitors); Eban Goodstein, Jobs and the Environment: The Myth of a National Trade-Off 19 (1994) ("Highly polluting industries are relocating to poor countries; but the reason, overwhelmingly, is low wages."); Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. Econ. Lit. 132 (1995) (finding that "overall, there is relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness"). See also Testimony of Sidney A. Shapiro, before the Subcommittee on Regulatory Affairs Committee on Government Reform, U.S. House of Representatives, April 12, 2005.

<sup>7</sup> Scott, Robert E., "The High Price of 'Free' Trade: NAFTA's Failure Has Cost the United States Jobs Across the Nation," November 17, 2003, Economic Policy Institute Briefing Paper #147.

<sup>8</sup> For just one example of this imperviousness, OMB claimed in the 2005 draft report that the costs associated with regulations is borne by workers, providing no support for this strong claim except for a citation to a single economics textbook. In its 2004 comments, CPR excoriated OMB for this thinly veiled and inaccurate attack on regulation, stating: "Textbooks, of course, do not all agree with each other, and they do not represent peer-reviewed literature, the standard of proof that OMB requires in other areas. OMB cites no empirical evidence for its claim. OMB should exclude this claim from the Report unless it produces evidence for it. Moreover, if OMB does produce evidence for this claim, it should address the significant evidence that exists on the other side of the issue. For example, University of California-Berkeley economist David Card and Princeton University economist Alan Krueger have written widely on empirical studies of minimum wage laws, finding that – contrary to assumptions in many textbooks – moderate increases in the minimum wage have a zero to slightly positive effect on employment. Their work has appeared twice in the prestigious *American Economic Review*, and the book-length version has been published by Princeton University Press." Heinzerling, Lisa and Frank Ackerman, Letter to Lorraine Hunt, OIRA, May 20, 2004, at 3. Regardless of this well-reasoned objection, OMB's 2005 draft report repeated the assertion verbatim and without noting CPR's critique.

<sup>9</sup> OMB, "Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations," at 6. This year's draft report lists only 26 major rules, of which 15 lack fully quantified costs, benefits, or both. Eight of those 15 state that the benefits are unquantifiable "homeland security" benefits, which OMB declares are simply too hard to quantify. (Two of those are food safety regulations securing the food supply against bioterror.) The remaining seven are a grab bag of protective policies and deregulation decisions, which include protections against mad cow disease (which lacks benefits estimates, because "the exact quantitative relationship between human exposure to the [mad cow disease] agent and the likelihood of human disease is still unknown"); a rule implementing a ban on trade with Syria while it continued to occupy Lebanon (which lacks benefits estimates); two regulations of migratory bird hunting (lacking cost estimates); the controversial rollback of overtime rights (which lacks benefits estimates and does have cost estimates, although it excludes an estimated 6 million workers who could lose overtime protections); and the regulation of computerized reservation systems for travel agents.

<sup>10</sup> As CPR pointed out in 2004 comments in a critique which went unanswered by OMB, the designation by OMB of some rules as transfer rules makes little sense. One so-called "transfer rule" is of particular interest, as it concerns a rule currently being challenged in court by Public Citizen. The rule allocates credits under the Corporate Average Fuel Economy (CAFE) program to automakers for the production of vehicles with a "dual-fuel" capacity. Because these vehicles actually use alternative fuel less than 1 percent of the time, according to the government's own published estimates, the rule permits overall fuel economy standards to be considerably lower than those set under CAFE. There are few clearly quantifiable public benefits and no monetizable benefits, according to NHTSA's regulatory impact analysis (RIA) on the subject, which also provides a cost estimate range for the rule as between 2.6 billion and 3.2 billion gallons

of gasoline, at a corresponding discounted value of between \$1.9 billion and \$2.2 billion. See “Final Economic Assessment, Alternative Fuel ed Vehicles, Extension of CAFE Option, Part 538,” Feb. 2004, Docket No. NHTSA-2001-10774-37. OMB has therefore designated a “transfer rule” a rule that has nothing to do with the budget, that NHTSA clearly thought required preparation of an RIA, and for which NHTSA estimated massive costs and only highly contingent, and possibly nonexistent, benefits.

<sup>11</sup> OMB, “Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations,” at 39.

<sup>12</sup> Overlooked studies included: Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 Tex. L. Rev. 1997, 2030-33(2002); Ruth Ruttenberg & Assocs., Public Citizen, Not Too Costly After All: An Examination of the Inflated Cost-Estimates of Health, Safety, and Environmental Protections, Feb. 2004 (available on-line at <http://www.citizen.org/documents/Not%20Too%20Costly.pdf>); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. Rev. 1553, 1554 (2002). Lisa Heinzerling and Frank Ackerman, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, New Press, Jan. 2004; Richard W. Parker, *Grading the Government*, 70 U. Chi. L. Rev. 1345 (2003).

<sup>13</sup> See Lisa Heinzerling and Frank Ackerman, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, New Press (2004) at 75-6 (providing ample discussion of the grave deficiencies in willingness-to-pay calculations, including its basis in studies rife with methodological problems); see also Heinzerling, Lisa and Frank Ackerman, Letter to Lorraine Hunt, OIRA, May 20, 2004.

<sup>14</sup> See *American Textile Manufs. Inst. v. Donovan*, 452 U.S. 490 (1981) (Cotton Dust case); *AFL-CIO v. American Petrol. Inst.*, 448 U.S. 607 (1980) (The “Benzene Case”).

<sup>15</sup> National Highway Traffic Safety Administration, “2004 Projections: Motor Vehicle Traffic Crash Fatalities and Injuries,” Washington, D.C.: NHTSA, Apr. 21, 2005, at 33.

<sup>16</sup> The National Transportation Safety Board has estimated driver fatigue as a probable cause in 58 percent of single-vehicle large truck crashes it investigated and 30 to 40 percent of all large truck crashes. See National Transportation Safety Board, “Factors That Affect Fatigue in Heavy Truck Accidents,” Washington, D.C.: NTSB, 1995, at v.

<sup>17</sup> Federal Motor Carrier Safety Administration; Notice of Proposed Rule: Hours of Service of Driver, Drivers Rest and Sleep for Safe Operations; Docket No.FMCSA-97-2350-972; Washington, D.C.: FMCSA; May 2, 2000; at 25544.

<sup>18</sup> The study involved 42 drivers only and classified 77 of the total 249 critical incidents recorded as the fault of the driver. See *Impact of Local/Short Haul Operations on Driver Fatigue*, U.S. Department of Transportation, Federal Motor carrier Safety Administration, Report No. DOT-MC-00-203, Sept. 200, at ix.

<sup>19</sup> S. Folkard, “‘Time On Shift Effects’ In Safety: A Mini-Review,” Abstract in the *Shiftwork International Newsletter*, May 1995, 12:1, Timothy Monk, ed., presentations from the 12<sup>th</sup> International Symposium On Night- and Shiftwork, Ledyard, CN, June 13-18, 1995. Multiple studies show that working past the 11<sup>th</sup> hour of a shift decreases performance and alertness. Additionally, long hours can lead to further decreased sleep time, as sleep is sacrificed to perform personal activities, and the cumulative effect of long hours can lead to unresolved sleep debt. See Roger Rosa and Michael Colligan, “Extended Workdays: Effects of 8-Hour and 12-Hour Rotating Shift Schedules On Performance, Subjective Alertness, Sleep Patterns, and Psychological Variables,” *Work and Stress*, 1989, 3:1, 21-32; Roger Rosa and Michael Colligan, “Extended Workdays: Effects of 8-Hour and 12-Hour Rotating Shift Schedules On Performance, Subjective Alertness, Sleep Patterns, and Psychological Variables,” *Work and Stress*, 1989, 3:1, 21-32; and Roger Rosa and Michael Bonnet, “Performance and Alertness On 8 H and 12 H Rotating Shifts At a Natural Gas Utility,” *Ergonomics*, 1993, 36:10, 1177-1193.

<sup>20</sup> Gibb HJ, Lees PSJ, Pinsky PF, Rooney BC. “Lung cancer among workers in chromium chemical production,” *Amer. J. of Industrial Med.* 2000; 38:115-26.

<sup>21</sup> The timeline for efforts to establish rules for hexavalent chromium exposure is as follows:

- **July 1993** - Public Citizen files a petition for a rulemaking for an occupational health standard for hexavalent chromium.
- **Feb. 1994** - OSHA agrees there is clear evidence of an excess risk of lung cancer with exposure at the existing standard, and states that it will publish a notice of proposed rulemaking no later than March 1995.
- **Aug. 1997** - After repeated delay in issuance of a notice (accompanied by repeated acknowledgments that the existing standard was inadequate and should be lowered by a factor of

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- 10 to 100), OSHA denies Public Citizen's request for a rulemaking schedule but says it will move as quickly as possible.
- **Oct. 1997** - Public Citizen brings an action in the Third Circuit claiming unreasonable delay and seeking to compel action. OSHA tells the court that the agency expects to issue a notice of proposed rulemaking (NPRM) by Sept. 1999.
  - **March 1998** - The court denies the Public Citizen petition to compel agency action, holding that agency delay is not yet extreme enough to warrant action and emphasizing the agency's intention to act in 1999.
  - **August 2000** - The Gibb study is published and confirms that hexavalent chromium causes lung cancer at exposure levels far below those permitted by the existing standard.
  - **Dec 2001** - OSHA's regulatory agenda demotes revision of hexavalent chromium to a "long-term action" with a timetable "to be determined."
  - **March 2002** - Public Citizen files another action in court, claiming unlawful delay.
  - **December 2002** - The court finds that the agency has engaged in unlawful delay and orders the parties to mediate over a possible remedy.
  - **Feb. 2003** - In mediation, OSHA proposes to take over four more years to issue a final rule; Public Citizen proposes a two-year schedule. The mediator recommends a three-year schedule.
  - **March 2003** - The court accepts the mediator's proposed schedule, calling for issuance of the NPRM by October 2004, and a final rule by January 2006.
  - **Oct. 2004** - OSHA issues the NPRM on schedule. The proposal calls for a 50-fold reduction in the exposure standard for hexavalent chromium, although OSHA acknowledges that significant risks will remain at that level. OSHA's cited rationale for not lowering the standard further is a concern about the technological feasibility of a lower standard for only two industries, out of dozens, in which workers are exposed.
  - **Feb. 2005** - OSHA holds two weeks of hearings on the proposed rule. Public Citizen, the National Institute for Occupational Safety and Health (NIOSH), and labor groups testify that OSHA should reduce the exposure level still further to eliminate the significant risks that remain at the proposed exposure levels. Industry comes out in force to claim the proposed rule will be economically infeasible and to ask for a much more permissive standard.
  - **April 2005** - Industry groups present a new study to OSHA in post-hearing comments, claiming that it shows that low levels of exposure do not elevate cancer risks. Public Citizen points out that the study is underpowered to support any such conclusions.